

Date: May 13, 1998

Case No.: 97-ST A-23

In the Matter of

WILLIAM J. BETTNER

Complainant

v.

DAYMARK FOODS, INC.

Respondent

APPEARANCES

Paul O. Taylor, Esq.
Taylor & Associates, Ltd.
Eagan, Minnesota
For the Complainant

Donald J. Vogel, Esq.
Michael Best & Friedrich
Chicago, Illinois
For the Respondent

Before: RUDOLF L. JANSEN
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This action arises under the Surface Transportation Assistance Act of 1982 (hereinafter "STAA"), as amended, 49 U.S.C. Section 31105 and the Regulations found at 29 C.F.R. Part 1978. Section 31105 of the STAA provides protection from discrimination to employees who report violations of commercial motor vehicle safety rules or who refuse to operate a vehicle when the operation would be a violation of these rules.

William J. Bettner (hereinafter Bettner) filed a complaint with the Secretary of Labor, Occupational Safety and Health Administration (hereinafter "OSHA") on January 14, 1998, alleging that Respondent, Daymark Foods, Inc., (hereinafter Daymark) discriminated against him in violation of Section 405(b) of the Act.

Bettner contends that he was discharged for refusing to drive excess hours in violation of U. S. Department of Transportation regulations. The Secretary of Labor, acting through his duly authorized agent, investigated the complaint and on May 29, 1997, determined that there was insufficient evidence to believe that the complaint of Bettner had merit. (ALJX 2). Bettner filed objections to the Secretary's findings by way of letter dated June 6, 1997, and requested a hearing before an Administrative Law Judge. (ALJX 3)

A formal hearing was held on December 2, 1997, in Chicago, Illinois where the parties were afforded full opportunity to present evidence¹ and argument. The Findings of Fact and Conclusions of Law which follow are based upon my observation of the appearance and demeanor of the witnesses who testified at the hearing and upon my analysis of the entire record, arguments of the parties, and applicable regulations, statutes and case law. Each exhibit received into evidence has been carefully reviewed.

ISSUES

1. Whether Daymark Foods, Inc. violated Section 31105 of the Service Transportation Assistance Act of 1982 by discharging William J. Bettner for having engaged in protected activity;
2. Whether Daymark Foods, Inc. required William J. Bettner to violate U.S. Department of Transportation regulations in the transportation of a shipment from Kennewick, Washington to Fredericksburg, Virginia between October 11, 1996 and October 17, 1996;
3. Whether William J. Bettner's refusal to operate a commercial motor vehicle in a manner violative of 49 C.F.R. §§ 392.3 and 395.3 is a protected activity under Section 31105(b) of the STAA; and
4. Whether William J. Bettner is entitled to reinstatement, money damages including back pay, attorney fees and costs.

¹In this decision, "JX" refers to Joint Exhibits, "ALJX" refers to the Administrative Law Judge Exhibits, "CX" refers to Complainant Exhibits, "RX" refers to Respondent Exhibits and "Tr." to the Transcript of the hearing.

STIPULATION OF FACTS

1. The Office of Administrative Law Judges, U.S. Department of Labor has jurisdiction over the parties and the subject.
2. Respondent is engaged in interstate trucking operations and is an employer subject to the Surface Transportation Assistance Act (hereinafter STAA) of 1982. (49 U.S.C. § 31105)
3. Complainant is now, and at all times material herein, a "person" as defined in § 401(4) of STAA 49 U.S.C.
4. Bettner was an employee of Daymark Foods, Inc. during the applicable periods in that he was employed as a driver of a commercial motor vehicle having a gross vehicle weight rating of 10,000 or more pounds which was used on the highways in interstate commerce to transport cargo.
5. Pursuant to § 405 of the STAA, Bettner filed a complaint on January 14, 1997 with the Secretary of Labor alleging that Daymark discriminated against him in violation of Section 31105 of the Surface Transportation Act (49 U.S.C. 31105).
6. The original complaint filed with the Secretary was timely.
7. Following an investigation, the Regional Administrator, Occupational Safety and Health Administration, issued his findings on the complaint on May 29, 1997.
8. Complainant received those findings by mail on June 6, 1997.
9. Complainant mailed an appeal and request for hearing to the Chief Administrative Law Judge, U.S. Department of Labor, Washington, D.C. on June 6, 1997.
10. The appeal of the complainant satisfied the 30-day time constraints provided by 29 C.F.R. § 1978.105(a).

FINDINGS OF FACT

William J. Bettner has been a truck driver for approximately the last eighteen years. Daymark Foods, Inc. employed Bettner as a truck driver from May 21, 1996 until October 17, 1996. Bettner's average weekly gross wage during this period was \$581.75. Daymark also paid Bettner a per diem travel allowance of six cents per mile for every mile driven. While employed with Daymark, Bettner had purchased health insurance coverage through the company plan at the rate of \$140.00 per month. At the time of his hiring, Bettner was given an orientation program and also instructed as to how to operate a refrigerated trailer unit, hereinafter referred to as a "reefer." Bettner had operated reefer units before he was employed by Daymark. As a part of the orientation, Bettner was instructed that if it ever occurred that he could not legally deliver a load without violating hours of service regulations, that he was to call dispatch.

As a part of his daily responsibility, Bettner was required to maintain a Driver's Daily Log. (JX 1) The log requires the driver to explain on a daily basis the amount of time that he was off-duty, in the sleeper berth, driving and on-duty performing other functions. Total hours are assigned to each of these activities. The record contains driver logs for the period extending from October 3, 1996 through October 17, 1996. The logs use a central time zone designation since that is the time zone of the Daymark home office. The off-duty time activity relates to the time spent at home, and also if in travel status while he is eating, taking a shower or cleaning up. Sleeper berth time is obviously time spent sleeping in the berth on the semi-truck. Driving time includes all time spent while behind the wheel of the vehicle. On-duty but non-driving time includes time spent with the truck while not driving but including time for which the trailer is being loaded or unloaded, counting pieces of freight or time spent at a scale house where the vehicle is being weighed. The log also discloses the total number of miles driven that day. Also included is a recap showing the total driving hours for the day, a violation time to be used where the vehicle is stopped by some authority, and an assignment of hours for the entire period that the driver was on duty. The log also contains a recapitulation for the seventy hours/eight day driver time which relates to a U.S. Department of Transportation driving restriction. The restriction in essence prohibits a driver from driving a vehicle more than seventy hours in an eight day period.

On October 3, 1996, Bettner was in Indianapolis, Indiana and picked up a load which was destined to be delivered in the area of Los Angeles, California. After dropping the load, Bettner proceeded on to Commerce, California where he picked up a load which was delivered near Las Vegas, Nevada. Bettner then went on to Henderson, Nevada where he picked up a load which was headed for

Tacoma, Washington. I have marked as Exhibit A a visual trip-tik which traces the route of Bettner from Indianapolis, Indiana all the way to Tacoma, Washington. The trip-tik includes dates, number of miles driven, locations visited, number of hours driven and number of hours on duty on each date that Bettner was in transit. Specific factual findings are made with respect to all of that data by way of this reference.

Bettner delivered the trailer in Tacoma, Washington late in the day on October 10, 1996. Early on October 11, 1996, Bettner received a dispatch to proceed to Kennewick, Washington to pick up a load. The pickup in Kennewick was scheduled for delivery to Fredericksburg, Virginia. When he picked up this load on October 11, 1996, he was told that the shipment must be delivered in Fredericksburg, Virginia by 6:00 a.m. eastern time on October 16, 1996. At the time the dispatch was given, Bettner did not believe that he could make the delivery timely because it was simply too many miles and he did not have enough on-duty hours available.

Although Bettner picked up the load in Kennewick on October 11, 1996, he did not notify Daymark that he would be unable to make the delivery timely until October 14, 1996 which was a Monday. On the Friday afternoon that Bettner realized that he would be unable to make the delivery timely, the dispatcher would have already left for the day. Daymark is not open on either Saturday or Sunday so Bettner could not have notified the company until the following Monday which he did by way of the Qualcomm computer system. He advised that it would be impossible for him to deliver the load timely since the distance was approximately 1,700 miles.

Bettner ordinarily would communicate with the dispatcher from Daymark by way of a satellite computer system referred to as Qualcomm. The system allows for the driver to enter both canned responses to questions and also to write his own messages and transmit them to Mike Young who was the dispatcher. Bettner also on occasion communicated with the dispatcher by way of telephone. By way of the Qualcomm system, Bettner provided the dispatcher the data which was included in his log book as noted above. Therefore, Daymark was aware on a daily basis as to the total number of hours that Bettner was on duty at all times.

I have prepared as Exhibit B a copy of the driver's trip tik tracing his route from Tacoma, Washington back to Indianapolis, Indiana. That trip tik discloses the same information noted on Exhibit A. All of that factual data is incorporated herein by this reference.

At some point in his return trip, Bettner was advised that another driver would haul the load from Indianapolis to Fredericksburg. So Bettner returned the load to the Daymark terminal in Indianapolis. As he was arriving at the Daymark

facility, he received another message over the Qualcomm that indicated that the other driver was unavailable and that he should complete the delivery to Fredericksburg. While at the terminal, he had a personal discussion with the dispatcher and another individual in which they contended that it was his fault that the load would be delivered late. Bettner advised them of the seventy hour rule at this point and that an insufficient amount of driving time was available to him to deliver the load timely. The management response to that contention was that Bettner "should be in some other line or profession" of work. The dispatcher then told Bettner to go ahead and take the load on to Fredericksburg. He directed that the load be delivered by the next morning at 6:00 a.m. This conversation took place between 4:00 and 5:00 p.m. on October 15, 1996. Fredericksburg, Virginia was over 600 miles from Indianapolis, Indiana. Bettner told the dispatcher that for him to take the load would be a violation of the hours of service rules if he were to deliver it the next day. Bettner could only have driven one quarter of one hour on October 16 before being in violation of the hours of service rules. In addition, his testimony was that he advised the dispatcher that he was tired and the dispatcher advised him that he ought to "get another profession."

Bettner then left Indianapolis and drove to Old Washington, Ohio where he went off duty. At 1:40 a.m. in the morning of October 17, 1996, Bettner sent Daymark a message that an Ohio State trooper had told him to shut the unit down. Bettner retired for the evening and was in his sleeper berth from 1:15 a.m. until 8:00 a.m. on October 17. He advised the Daymark dispatcher early in the morning of October 17 that he did not make the delivery in Fredericksburg and that he was in Washington, Ohio. Following a Qualcomm exchange, the dispatcher asked for Bettner's exact location and told him to wait there for another driver in order to swap trailers and that he was to return to Indianapolis.

The trailer swap was made in Old Washington and Bettner then drove to Indianapolis where he met the next day, on October 18, 1996, with Mike Young, the dispatcher. The dispatcher at that time fired him "for delivering loads late." (Tr. 99-100) Bettner then cleaned out his equipment and he was put on a bus to go home. There was no conversation at that time as to which appointments they considered that he had delivered late. A supervisor by the name of Gary W. Knotts reaffirmed the firing by Mike Young on that same date. In the conversation with Knotts, he indicated initially that the load delivered in Tacoma, Washington was late. However, a review of the computer record of the trip disclosed that Bettner would have been given one day to deliver the load from Indianapolis, Indiana to Tacoma, Washington and that obviously was impossible. (Tr. 105-106) During the trip from Indianapolis to Tacoma, Washington, Bettner experienced a traffic accident which had shut down the highway, reefer problems on two different occasions, and also he was delayed as a result of a trailer which he was to pull

not being ready. The record shows that on the return trip from Tacoma, Washington, that Bettner was required to wait for a decision by Daymark as to whether it would pay a \$75.00 late fee; to wait to be loaded; and also wait to scale the load. He also experienced a flat tire which delayed him for a number of hours, and also reefer problems. He also was delayed because of mountain driving. Bettner testified that paperwork being late at Daymark can also lead to delays.

Following his termination by Daymark, Bettner worked for Midwest Trucking from October 19, 1996 until November 29, 1996 for an average weekly gross wage of \$412.42. Bettner was unemployed from November 30, 1996 until March 31, 1997. From April 2, 1997 until June 28, 1997, Bettner was employed by Roehl Transport during which time his average weekly gross wage was \$567.03. P.C. Services employed Bettner from July 7, 1997 up to the date of the hearing at an average weekly gross wage of \$444.70. Midwest Trucking, P.C. Services and Roehl Transport did not pay Bettner a travel allowance. Roehl Transport had offered Bettner health insurance coverage whereas P.C. Services did not. Following his firing on October 18, 1996, Bettner wrote a letter to Mr. Kim Hill, who is the Vice President of Retention at Daymark in which Bettner requested that he be reinstated to his truck driving job. (JX 6) On October 23, 1996, Tim Hill, the President and CEO of Daymark, responded that after reviewing the firing decision, that he believed the decision was correct and that it would stand. He suggested that the primary reason that he was terminated was because of his inability to meet dispatches.

The record contains four unsatisfactory performance reports prepared by Daymark concerning Bettner. (JX 4) The reports of September 27, 1996, October 11, 1996 and October 14, 1996 all relate to late deliveries and were prepared by Mike Young who is the dispatcher. None of those reports were apparently shown to Bettner and he did not acknowledge by his signature that he had seen the reports. The report of October 16, 1996 was also prepared by the dispatcher and it was signed by Bettner and he noted disagreement with the content of the report. He did not read it before he signed it. The record also contains a Termination Report which was prepared by Gary Knotts. Mr. Bettner had not seen this report prior to the time of the hearing. (Tr. 153-154) The termination notice indicates that Bettner had been dismissed and that his initiative and quality of work were unsatisfactory. It discloses that his cooperation and job knowledge were fair and that his attendance was satisfactory. The comment section of the termination notice provides that the "Driver consistently late. Sitting with no justification." The form also notes that Bettner was not eligible to be rehired.

Bettner testified that he had delivered loads late previously but never after the scheduled delivery date. His lateness related

to the hour of delivery and not the date. (Tr. 156) The record contains no prior disciplinary reports concerning deliveries to other locations besides the unsatisfactory performance reports mentioned above which date only from September 27, 1996 through October 14, 1996. The Qualcomm reports for the eight day period extending from October 9 through October 17, 1996 were stipulated. (Exhibit E, pp. 1-44) They disclose that on October 9, 10 and 11, that Bettner advised the dispatcher that he was on schedule. One dispatch notes that he was running two hours late because of a variety of problems including a flat tire, reefer problems, having to drive through the mountains and also late loading. The dispatches show that on October 12, Bettner advised that he was not on schedule and that posture remained through October 13 and 14. Bettner indicated in the dispatch of October 14 that he still had 1,350 miles left and that he couldn't make it by October 16 which was the due date for the delivery. He clearly explained in this dispatch the reasons for his being late and why it was impossible for him to make the delivery on October 16 by 6:00 a.m. He asked that the date for delivery be changed. He reiterates in his last Qualcomm statement of October 14 that the load cannot legally be taken to Fredericksburg for delivery on October 16. On October 15, Bettner once again reiterates that he is not on schedule. On October 16, Mike Young asked him to bring the load to Indianapolis as soon as possible. In another exchange on that date, Bettner mentions that based upon hours of service violations that this is not a legal run. Mike Young directs in the last dispatch of October 16 that Bettner take the load to Virginia.

The Qualcomm included a system for a Form numbered 33. The purpose of that form was to allow a driver to input information to notify a dispatcher that he was running late. (Tr. 183) Bettner worked for Daymark approximately six months and during that period Bettner estimated that he would have filled out a Form 33 approximately two or three times. (Tr. 189)

Fred Paul Savoie (hereinafter Savoie) is the Director of National Transportation for Daymark. In that position he monitors fuel systems, the Qualcomm, dispatch systems and works with driver retention to continue to develop the fuel program. He had previously been a driver for Daymark. Savoie testified at length about the application of the 70 hour 8 day rule applicable to drivers for Daymark. It was conceded on brief by Daymark's counsel that his testimony in that regard was inaccurate and incorrect. (Respondent Post Hearing Brief, p. 4, footnote 1) Although he was in charge of driver retention for Daymark and establishing programs to retain drivers, he was not personally involved in any way with the termination of Bettner. (Tr. 209)

Savoie testified that Daymark drivers will average between 500 to 600 miles per day at 50 to 60 miles per hour. However, he acknowledged that road conditions including the terrain and traffic

problems, together with other stops, can have an impact on the total number of miles driven. Daymark seeks approximately 2,500 miles per week per truck which is also an industry standard. For purposes of this case, Savoie testified that he could not determine why Bettner did not make the run timely from Kennewick, Washington to Fredericksburg, Virginia. He also testified that for Daymark record purposes, that in computing actual distances, that Daymark uses the mileage from the Household Movers' Guide. He acknowledged that the Guide may be "light" anywhere from six to ten percent. That means that the actual distances used in the Daymark reports may be from six to ten percent shorter than the actual driving distances. Thus, although Daymark records show that the distance between Kennewick, Washington and Fredericksburg, Virginia was 2,579 miles, that in actuality that distance at a six percent differential could have been 2,733 miles.

At the time of the hearing, I listened carefully to the testimony of both William J. Bettner and Fred Paul Savoie and I also observed their demeanor. I find both of the witnesses to have been entirely credible.

CONCLUSIONS OF LAW

The STAA provides in relevant part, at 49 U.S.C.A. § 31105(a) that:

(1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment because - -

(B) the employee refuses to operate a vehicle because - -

(i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health;

The regulations at 49 C.F.R. § 392.3 provide in pertinent part as follows:

No driver shall operate a commercial motor vehicle, and a motor carrier shall not require or permit a driver to operate a commercial motor vehicle, while the driver's ability or alertness is so impaired, or so likely to become impaired, through fatigue, illness, or any other cause, as to make it unsafe for him/her to begin or continue to operate

A refusal to drive when fatigued in violation of 49 C.F.R. § 392.3 is protected activity under this regulation. Polger v. Florida Stage Lines, 94-STA-46 (Sec. Apr. 18, 1995).

The United States Department of Transportation Hours of Service Regulations provide in pertinent part that:

(b) No motor carrier shall permit or require a driver of a commercial motor vehicle to drive, nor shall any driver drive, regardless of the number of motor carriers using the driver's services, for any period after -

- (2) Having been on duty seventy hours in any period of eight consecutive days if the employing motor carrier operates commercial motor vehicles every day of the week.

This case was fully tried on the merits. Therefore, it is not necessary for me to engage in an analysis of whether Bettner presented a prima facie case. United States Postal Serv. v. Aikens, 460 U.S. 709 (1983); Jones v. Consolidated Personnel Corp., (ALJ Case No. 96-STA-1, ARB Case No. 97-009, Jan. 13, 1997); Etchason v. Carry Cos., Case No. 92-STA-12 (Sec. Mar. 10, 1995); Carroll v. Bechtel Power Corp., Case No. 91-ERA-46 (Sec. Feb. 15, 1995) slip op. at 11, aff'd, 78 F.3d 352 (8th Cir. 1996). Since Daymark presented rebuttal evidence at the time of the hearing, the answer as to the question whether Bettner established a prima facie case is no longer useful.

On brief, Daymark does not dispute that it was aware of Bettner's complaints concerning the hours of service violations and it is also undisputed that he was terminated shortly after raising those complaints which justifies an inference of retaliatory motive. Carroll v. Bechtel Power Corp, supra. As was stated in Andreae v. Dry Ice, Inc., 95 STA-24, (ARB Jul. 17, 1997), this case is now in the posture where "The critical factual inquiry is whether retaliatory animus motivated the adverse employment action." In other words, for our purposes here, has Bettner established by a preponderance of the evidence that he was discharged because of his protected activity.

An employee engages in protected activity when he refuses to operate a commercial motor vehicle under circumstances which would constitute a violation of a safety or health rule or regulation including Department of Transportation hours of service regulations. Greathouse v. Greyhound Lines, Inc., 92-STA-18 (Sec. Aug. 31 1992); Brown v. Besco Steel Supply, 93-STA-30 (Sec. Jan. 24, 1995); Self v. Carolina Freight Carriers, Corp., 91-STA-25 (Sec. Aug. 6, 1992). In order to gain protection, the employee must have sought from the employer and been unable to obtain from him,

correction of any unsafe condition causing the employee apprehension of injury to himself or to the public. Refusal to work because of fatigue is protected.

On brief, the complainant argues that Daymark required him to violate the U. S. Department of Transportation regulations in the transportation of the shipment from Kennewick to Fredericksburg, Virginia. The complainant's brief goes into major detail concerning the application of the hours of service regulations to the facts of this case. Complainant contends that in compelling the delivery on October 17, 1996 at 6:00 a.m. that Daymark required Bettner to violate both the fatigue and the hours of service regulations. Daymark, on the other hand, on brief acknowledges the illegality of compelling a driver to operate a commercial motor vehicle in violation of the applicable regulations. Daymark contends that even if it had been shown that the complainant would have been required to drive illegally in order to deliver the load, that he still had failed to satisfy his burden of proof. While acknowledging that Bettner would have been engaging in protected activity for refusing to drive the load once he reached his legal limit of hours, employer suggests that Bettner failed to take steps necessary to be on time and that failure was not a protected activity. The employer's arguments are specious at best and attempt to twist the actual facts in order to justify the termination based on a history of untimeliness. The record suggests another reason. The company offered no evidence contradicting Bettner's testimony concerning any of his delays. Therefore, the legitimacy of the delays is uncontested and they stand unrebutted by this record.

Bettner experienced a variety of problems on both his outgoing trip from Indianapolis and his incoming trip back to Indianapolis from Tacoma. The record suggests that Bettner experienced delays as a result of a traffic accident which shut down the highway, reefer problems on two different occasions and also delay as a result of a trailer which he was to pull not being ready. All of these delays occurred on the outgoing trip. On the return from Tacoma, the record shows that Bettner was delayed while seeking instruction from Daymark as to whether they were going to pay a \$75.00 late fee. In addition, he waited to be loaded and waited to scale his load. He also experienced a flat tire which delayed him for a good number of hours and also once again had reefer problems. Mountain driving also further served to delay his return trip. Employer acknowledges none of these items as serious reasons for maintaining his driving schedule. Daymark was clearly aware through Qualcom on a daily basis as to the number of duty hours and driving hours that Bettner had accumulated over the eight day period. In fact, the record shows that the dispatcher had checked his hours of service during this trip. (RX E, p. 28)

The company offered no evidence whatsoever by anyone who was personally familiar with the facts concerning the reasons for the discharge of Bettner. The sole company employee who testified was the Director of National Transportation, but his responsibility was in the areas of monitoring fuel systems, dispatch systems, the Qualcom and also he works with drivers concerning retention problems. He was personally unfamiliar with the specific facts concerning the termination of Bettner.

The record does contain unsatisfactory performance reports prepared by the dispatcher. Three of those unsatisfactory reports relate to dates upon which Bettner was on his return trip from Tacoma. The fourth report relates alleged events occurring approximately one week before Bettner left on the fateful trip to Tacoma. Bettner testified that he had only seen and signed one of these reports which was the one of October 16, 1996. None of the other reports were shown to him and my suspicion would be that they were prepared after the fact. The record also contains the termination report prepared by Bettner's supervisor. That report indicates that the driver was consistently late and sitting with no justification. This record simply does not support those contentions. There were good reasons why Bettner had not returned to Indianapolis on schedule as noted above and his on-duty-hours and driving hours give no indication that he is sitting around with no justification. Since neither the dispatcher nor the supervisor testified in this case, the written comments on all of these records were not tested. Perhaps that is true for good reason.

In evaluating this entire record, it is my conclusion that the basis offered for the firing of Bettner is pretextual. Since Bettner was terminated shortly after raising the complaints concerning the hours of service violations, an inference is raised that his termination was retaliatory. Regardless, the overwhelming facts in this case support a finding that there existed a retaliatory animus which motivated the termination. What is interesting about this factual record, is that the company seems to argue that its problems with Bettner concerning late deliveries began at the time he left Tacoma, Washington and were continuous until he was relieved while on his way to Kennewick. The record suggests otherwise. Following his assignment and acceptance of the load in Kennewick, Bettner indicated that in order to deliver that load, that he would be required to violate the hours of service regulations. He advised the company of that fact. Subsequently, the dispatcher acknowledged Bettner's correctness in that regard when he told him to bring the load to Indianapolis and another driver would be assigned to take it to Fredericksburg. However, while in transit, the directive was rescinded and Bettner was advised that Daymark did not have another driver to carry the load to Fredericksburg, and therefore, he would be required to take it. Subsequently, upon receipt of that directive, he once again told them that to do so would require him to violate the hours of

service regulations. After returning to the Indianapolis yard and then being directed to proceed on to Fredericksburg, Bettner was advised by an Ohio State trooper to shut his rig down. It was at that point when the dispatcher realized that the load to Fredericksburg would not be delivered timely on October 17 that the decision to fire Bettner was apparently made.

The driving logs record Bettner's duty hours as follows:

70 HOURS/8 DAY DRIVERS

<u>Date</u>	<u>"A"</u> Total Hours on Duty Last 7 Days Including Today	<u>"B"</u> Total Hrs. Available Tomorrow 70 Hrs. minus "A"	<u>"C"</u> Total Hours on Duty Last 8 Days Including Today
10/3/96	36.25	33.75	42.50
10/4/96	37.75	32.25	46.25
10/5/96	44.50	25.50	44.50
10/6/96	54.00	16.00	54.00
10/7/96	61.00	09.00	61.00
10/8/96	58.75	11.25	67.50
10/9/96	60.25	09.75	66.75
10/10/96	60.00	10.00	69.50
10/11/96	56.75	13.25	61.75
10/12/96	54.00	16.00	63.75
10/13/96	55.50	14.50	65.00
10/14/96	58.25	11.75	65.25
10/15/96	60.50	09.50	67.00
10/16/96	61.75	08.25	69.75
10/17/96	58.50	11.50	67.75

<u>DATE</u>	<u>ON DUTY HOURS</u>	<u>DRIVING HOURS</u>
October 3, 1996	9.50	8.50
October 4, 1996	10.00	9.75
October 5, 1996	9.75	9.00
October 6, 1996	9.50	9.00
October 7, 1996	7.00	6.25
October 8, 1996	6.50	6.00
October 9, 1996	8.00	7.50
October 10, 1996	9.25	8.50
October 11, 1996	6.75	6.25
October 12, 1996	7.00	6.50
October 13, 1996	11.00	10.50
October 14, 1996	9.75	9.50
October 15, 1996	9.00	8.50
October 16, 1996	9.00	8.25
October 17, 1996	6.00	4.50

His driving history on this trip when coupled with the unexpected delays, give no evidence in support of Daymark's contention that Bettner was responsible for any late deliveries. On the return trip home, he consistently had nine to eleven hours of on duty time and I am not sure what else could be expected. Bettner had nine on duty hours on October 16th and to expect him to have driven all night until 6:00 a.m. on the 17th was an unsafe directive. (See JX 2)

When he had previously complained of potential violations of the hours of service regulations, he was told by the dispatcher that he ought to be in some other line of work. Daymark apparently attempted to accommodate the dispatcher's feeling in that regard when it terminated him. It is my conclusion that Bettner was terminated as a result of his having reminded the company that if he carried the load to Fredericksburg, that it would require him to be in violation of the hours of service regulations. A clear preponderance of the evidence in this case supports that conclusion.

DAMAGES

Complainant contends that as a result of his unlawful termination that he is entitled to reinstatement, back pay, costs and attorney fees. Employer, on the other hand, argues on brief that Bettner did not properly mitigate his damages. Daymark contends that the fact that complainant took a position which paid him less money than he would have made at Daymark, should not prejudice the employer. Additionally, the employer argues that the six cents per mile per diem that Bettner received was paid to offset expenses while in travel status such as meals, showers, laundry and lodging. It is contended that since he was not driving on the road, that he experienced no expenses to offset these dollars.

A. REINSTATEMENT

Under the STAA, the Secretary must order reinstatement upon finding reasonable cause to believe that a violation occurred. The reinstatement directive takes effect immediately. Spinner v. Yellow Freight System, Inc., 90-STA-17 (Sec. May 6, 1992).

B. BACK PAY

A wrongfully discharged STAA complainant is required to mitigate his damages through the exercise of reasonable diligence in seeking alternative employment. Cook v. Guardian Lubricants, Inc., ARB Case No. 97-051, Second Decision and Remand Order, May 30, 1997, slip op. at 5; Hufstetler v. Roadway Express, Inc., 85-STA-8 (Sec. Aug. 21, 1986) slip op. at 49-58, aff'd sub nom. Roadway Express, Inc. v. Brock, 830 F.2d 179 (11th Cir. 1987). The employer, on the other hand, has the burden of establishing a

failure to mitigate on the complainant's part. Cook v. Guardian Lubricants, Inc., supra; Lansdale v. Intermodal Cartage Co. Ltd., 94-STA-22 (ALJ Mar. 27, 1995) adopted by the Secretary July 26, 1995. In satisfying this burden, the employer must establish that comparable jobs were available during the interim period and that a complainant failed to make a reasonable effort to find new employment that was substantially equivalent to the former position and suitable to a person of his or her background and experience.

Daymark paid Bettner an average weekly wage of \$581.75. That figure was stipulated. In addition, Bettner was paid a per diem travel allowance of six cents per mile for every mile driven. Daymark offered no substantive evidence concerning Bettner's mitigation of his damages. Daymark suggests that the six cent travel allowance was to offset expenses incurred on the road, however, Bettner suggests that the six cents per mile was paid to supplement his wage. Since there is no evidence in the record disputing Bettner's contention in that regard, I accept his representation. Finally, Bettner indicates in his brief that if he had remained as an employee of Daymark, that he would have driven approximately 100,000 miles after his termination of October 19, 1997. Thus, at six cents per mile, Bettner claims an additional item of compensation for the per diem value of \$6,000.00 in lost travel allowances. I concur in that request.

Following his termination at Daymark, Bettner was employed by Midwest Trucking from October 19, 1996 until November 29, 1996. During that period of time, his average weekly wage was \$412.42. Therefore, an income differential existed of \$169.33 per week for which he should be compensated. Thus, his wage loss amounts to four weeks of lost earnings of \$169.33 per week or \$677.32.

Bettner was then out of work for 19.5 weeks causing an average weekly wage loss of \$581.75 per week or \$11,344.13 in total.

Bettner next had employment with Roehl Transport from April 16, 1997 to July 11, 1997. During this period his average weekly wage was \$460.34. His pay check therefore was \$149.11 less than his average weekly wage at Daymark. Thus, Bettner experienced a shortfall in this employment of \$1,938.43 as a result of his earnings being less than his average weekly wage at Daymark.

P. C. Services hired Bettner in July of 1997. In this position his average weekly wage was \$443.00 which is \$166.06 less than his average weekly wage at Daymark. Bettner was employed with P. C. Services as of the time of the hiring. His total wage loss during this entire period amounts to \$2,989.08.

Bettner also claims compensation for the value of his lost health insurance amounting to \$400.00 per month. Bettner was required to pay \$140.00 per month for this insurance value.

Bettner is entitled to an award of health, pension or other related benefits which are terms, conditions and privileges of employment from the date of the discriminatory layoff until reinstatement or declination of an offer of reinstatement. Creekmore v. A B B Power System Energy Services, Inc., 93-ERA-24 (Dep. Sec. Feb. 14, 1996). These compensable damages include premiums for family medical coverage. Crow v. Noble Roman's, Inc., 95-CAA-8 (Sec. Feb. 26, 1996). Bettner claims an additional \$3,380.00 for health insurance premium compensation. It is not entirely clear how this number was determined. Assuming a differential value of \$260.00 as a result of the complainant's contribution to the health insurance premium, the requested damage amount consists of about thirteen months of lost premium value. Uncertainties in calculating back pay are resolved against the discriminatory party. Kovas v. Morin Transport, Inc., 92-STA-41 (Sec. Oct. 1, 1993). Therefore, I conclude that Bettner is entitled to reimbursement of the full \$3,380.00 claimed.

ATTORNEY FEE

No petition for attorney fees has been submitted by Bettner's counsel. In calculating attorney fees under the STAA, 49 U.S.C. § 2305(c)(2)(B), it is usual to use the loadstar method which requires multiplying the number of hours reasonably expended in bringing the litigation by a reasonable hourly rate. See Clay v. Castle Coal and Oil Co. Inc., 90-STA-37 (Sec. Jun. 3, 1994). Paul O. Taylor, Bettner's counsel, will have twenty (20) days from the date of receipt of this Recommended Decision and Order to submit an attorney fee application. The employer will then have an additional fifteen days from the date of receipt of that application within which to file any formal objections.

In addition to an attorney's fee for services, a successful petitioner is entitled to reimbursement also for costs in prosecuting a successful complaint. Sickau v. Bulkamatic Transport, Inc., 94-STA-26 (Sec. Oct. 21, 1994). Any expenses associated with the prosecution of this case should also be itemized separately in the attorney fee application.

PREJUDGMENT INTEREST

Complainant is entitled to prejudgment interest on his back pay award to be calculated in accordance with 26 U.S.C. § 6621. Bettner is not entitled to interest on the attorney fee award.

ORDER

Based upon the foregoing findings of fact, conclusions of law and upon the entire record, I HEREBY RECOMMEND that Daymark Foods, Inc. be required to compensate William J. Bettner as follows:

1. Lost wages and other benefits consisting of

Wage shortfall at	
Midwest Trucking	\$ 677.32
Lost wages while unemployed	11,344.13
Wage shortfall at Roehl Transport	1,938.43
Wage shortfall at P.C. Services	2,989.08
Value of lost health premiums	3,380.00
Loss of 6 cents per mile wage supplement	6,000.00
TOTAL	\$26,328.96

2. Immediately reinstate William J. Bettner to his former position as a truck driver;
3. Pay prejudgment interest on the back pay award calculated in accordance with 26 U.S.C. § 6621.

Rudolf L. Jansen
Administrative Law Judge

NOTICE: This Recommended Decision and Order and the administrative file in this matter will be forwarded for review to the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Ave., NW, Washington, DC 20210. See 29 C.F.R. § 1978.109(a); 61 Fed. Reg. 19978 and 19982 (1996).